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No. 87-150

In The

Supreme Court of the United States

October Term, 1987

KARL SCHERMER & CO., a foreign company,

Petitioner,

vs.

ALPHA INTERNATIONAL, a corporation,

Respondent.

On Petition for Writ of Certiorari to the Superior Court of New Jersey

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether the U.S. Supreme Court should review an interlocutory matter that has not been finally addressed by the New Jersey Supreme Court.

2. Whether the U.S. Supreme Court should review a matter that is moot as service is being effected pursuant to the Hague Convention.

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OPINION BELOW AND RELATED PROCEDURAL HISTORY

The opinion below is reprinted at petitioner's appendix 1a through 5a. Petitioner moved for interlocutory leave to appeal from the January 6, 1987 order of the Hon. Milton Feller (6a), first to the Superior Court of New Jersey, Appellate Division,

which motion was denied (7a) and thence to the Supreme Court of the State of New Jersey which motion was also denied (8a).

JURISDICTION

The jurisdiction of the Court to review a final decision of a state court of last resort is invoked by petitioner pursuant to 28 U.S.C. § 1257(3).

The respondent asserts the Court is without jurisdiction to review the decision rendered below as they are moot because service pursuant to the Hague Convention has subsequently been made. Further, the decisions below do not constitute a final decision but are interlocutory and therefore the Court is without jurisdiction.

TREATY AND CONSTITUTIONAL PROVISIONS INVOLVED

The Convention on Service Abroad of Judicial and Extrajudicial Documents in Civil and Commercial Matters ("Hague Service Convention"), 20 U.S.T. 361, T.I.A.S. 6638, 658 U.N.T.S. 163, is reprinted at App. 26a-46a of petitioner's brief.

The United States Constitution, Article VI, Clause 2:

> ". . . all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding."

The United States Constitution, Amendment XIV, Section 1:

> ". . .nor shall any State deprive any person of life, liberty, or property, without due process of law. . ."

New Jersey Court Rule 4:4-4(i):

> If service cannot be made by any of the modes provided by this rule, any defendant may be served as provided by court order, consistent with due process of law.

STATEMENT OF THE CASE

In this product liability action plaintiff, Fernando Macri alleges that he sustained injuries on October 15, 1983 while using a cattle stunning device. It has been further alleged that the device was manufactured by Karl Schermer & Co. (Schermer) and distributed by Alpha International (Alpha).

This suit was filed on January 24, 1985. On December 20, 1985 the Hon. Lawrence Weiss signed an order granting leave to defendant Alpha International to file and serve a third-party complaint against Karl Schermer & Co. The third-party complaint advanced claims for contribution, indemnification and breach of warranty. Although attempted, service could not be made on Karl Schermer & Co. in Germany.

Thereafter the Hon. Milton Feller signed an order permitting substituted service of the third-party complaint upon Allianz Insurance Company in Los Angeles, California. The third-party summons and complaint were served upon the Allianz Insurance Company. Thereafter Karl Schermer & Co., through New Jersey counsel, filed a motion returnable December 5, 1986, to vacate Judge Feller's October 10, 1986 order and quash service of process (Petitioner's App. 6a). That motion was denied. A formal

appearance was entered for Schermer on November 21, 1986. However an "informal" appearance was entered on behalf of Schermer as early as October 6, 1986.

In support of its motion to vacate Judge Feller's order and quash service of process Schermer submitted a certification in lieu of affidavit from Edwin Melcher, managing director of Schermer. The certification which was signed by Mr. Melcher was prepared in English by Schermer's New Jersey counsel.

REASONS FOR DENYING THE WRIT

I

THE COURT IS WITHOUT JURISDICTION AS THERE HAS BEEN NO FINAL DECISION AS REQUIRED BY 28 U.S.C. § 1257.

28 U.S.C. § 1257 states:

> State courts; appeal; certiorari
>
> Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court as follows:
>
> (1) By appeal, where is drawn in question the validity of a treaty or statute of the United States and the decision is against its validity.
>
> (2) By appeal, where is drawn in question the validity of a statute of any state on the ground of its being repugnant to the Constitution, treaties or laws of the United

> States, and the decision is in favor of its validity.
>
> (3) By writ of certiorari, where the validity of a treaty or statute of the United States is drawn in question or where the validity of a State Statute is drawn in question on the ground of its being repugnant to the Constitution, treaties or laws of the United States or where any title, right, privilege or immunity is specially set up or claimed under the Constitution, treaties or statutes of, or commission held or authority exercised under the United States.

This statute clearly requires that in order to petition the Supreme Court of the United States for certiorari, a final judgment or decree must be rendered by the highest court of the state.

This requirement is not a mere technicality, but is important to the smooth working of our federal system. *Montgomery Bldg. & Const. Trades Council v. Ledbetter Erection Co.,* 344 U.S. 178 (1952).

A state court judgment to be within the appellate jurisdiction of the United States Supreme Court, must be "final" in two senses. First it must be subject to no further review or correction in any other state tribunal, and must be an effective determination of the litigation and not of merely interlocutory or intermediate steps therein. Secondly it must be the final word of a final court. *Market St. Ry. Co. v. Railroad Commission of State of Cal.,* 324 U.S. 548, 550-551, *rehearing denied,* 324 U.S. 890 (1945).

On its face the case at bar is not a final judgment. Petitioner's brief clearly states that the applications to the Superior Court

of New Jersey Appellate Division and Supreme Court of the State of New Jersey were by motions for leave to appeal (Pa-7a; Pa-8a). According to the Rules of Court of New Jersey appeals may be taken as of right to the Appellate Division from final judgments in the Superior Court, Trial Division. R. 2:2-3. Application for leave to appeal must be made to appeal from interlocutory orders, decisions or actions. R. 2:2-4. Likewise, appeals to the Supreme Court of New Jersey from Interlocutory orders must be made by application for leave to appeal. R. 2:2-2.

Here petitioner's motions for leave to appeal from Judge Feller's interlocutory order were denied by the Appellate Division and Supreme Court of New Jersey. Thus none of the jurisdictional requirements for finality of judgments have been met in this case. In this light the instant petition for certiorari should be denied.

II

THE ISSUE IS MOOT SINCE PETITIONER KARL SCHERMER & CO. IS BEING SERVED IN ACCORDANCE WITH THE PROVISIONS OF THE HAGUE SERVICE CONVENTION.

Ordinarily, the Court will not decide cases which have become moot. *Taylor v. McElroy*, 360 U.S. 709 (1959); *Lewis Publishing Co. v. Wyman*, 228 U.S. 610 (1912); *Fischer v. Baker*, 203 U.S. 173 (1906).

Here the petitioner seeks certiorari to have the Court decide the issue of whether the service upon the petitioner was valid or in contravention of the provisions of the Hague Service Convention. 20 U.S.T. 361. Subsequent to the decision of Judge Feller and prior to the filing of the instant petition third-party plaintiff-respondent forwarded the necessary papers for service according to the provisions of the Hague Convention, to the

Ministerium fur Justiz, Baden-Wurttemberg, Postfach 5 37, 7000 Stuttgart 1, West Germany, and as of the writing of this brief has received a return receipt of certified mail indicating said papers were received by the Ministerium on August 5, 1987 (4a-5a). The summons, complaint and third-party complaint were forwarded to service both in English and German. A copy of the return of service upon Karl Schermer & Co. will be provided immediately upon receipt.

In this light the issue presented by this petition is moot and should not be considered by this Court.

III

THE DECISION OF THE COURT BELOW WAS PROPER AND THEREFORE REVIEW BY THIS COURT IS UNNECESSARY.

Schermer argues that Judge Feller's ruling is a direct contravention of a United States treaty. It is not, nor does his opinion render the treaty a nullity as Schermer has asserted. Judge Feller's actions and opinion are quite consistent with the purposes of the Hague Convention. As Judge Feller aptly pointed out, the Hague Convention does not mandate a blanket application of its provisions. Rather, the appropriate inquiry is whether or not the defendant is on notice of the claims against it. If it is, then the purpose of the Hague Convention has been satisfied. *Cintron v. W.D. Machinery Co., Inc.*, 182 N.J. Super. 126 (Law Div. 1981); *Isothermics v. U.S. Energy Research & Dev. Agency*, 434 F. Supp. 1155 (D.C.N.J. 1977). Here Schermer had much more than adequate notice.

Contrary to the assertions of Schermer, service of process in this case is not controlled by a strict application of the Hague Convention. As indicated, the purpose of the convention is to

create the appropriate means to ensure that judicial and extrajudicial documents to be served abroad are brought to the attention and notice of the addressee in sufficient time to respond to them.

Ensuring that the defendant has notice of the claims against it is the cornerstone of the Hague Convention. The other requirements can be relaxed if the notice requirement is met. *Isothermics v. U.S. Energy Research & Dev. Agency, supra.* In *Isothermics* a Japanese defendant, Furukawa Electric Co., Ltd. sought compliance with the Hague Convention after being served by mail pursuant to F.R. Civ. P. 4(i)(1)(D). The Court did not find it necessary to decide the issue, concluding that defendants "even if not effectively served with process, are at least on notice of ISO's [plaintiff's] claim." *Id.* at 1158.

As Judge Feller pointed out in his opinion, the Convention does not mandate a blanket application of its provisions.

> "Rather, it is to be invoked where plaintiff fails to establish that either an officer, director, transferee or managing or general agent of the defendant or any person has been authorized by appointment or by law to receive service of process on its behalf." *citing Cintron v. W.D. Machinery Co. Inc.*, 182 N.J. Super. 126, 134 (Law Div. 1981).

What must be shown is that the defendant received sufficient notice of the claims against it and that someone is authorized to receive service of process on its behalf. Clearly Schermer had more than sufficient notice of the claims against it. Schermer's attorney wrote to Judge Feller about this case on October 6, 1986. Allianz was served on October 24, 1986. A motion was filed by Schermer on November 21, 1986. Schermer was also well aware

of the nature of the claims being asserted against it in this action having previously been named as a defendant in at least two other cases involving stunning devices. Schermer is not in a position to now say it had no notice of this claim.

Substituted service on a defendant is specifically authorized by the New Jersey Rules of Court, R. 4:4-4(i), which provides:

> "If service cannot be made by any of the modes provided by this rule, any defendant may be served as provided by Court order, consistent with due process of law."

> "The obvious intent of R. 4:4-4(i) was to provide for service in those cases where it might not otherwise be effected. There is no specific language limiting service under the rule to a particular type of case." *Houie v. Allen*, 192 N.J. Super. 517, 520 (App. Div. 1984).

An order may be entered permitting substituted service on a defendant by serving its insurance carrier. *Feuchtbaum v. Constantini*, 59 N.J. 167 (1971); *Houie, supra* at 522.

> "By its contract the carrier has the right and duty to defend any action against the insured. The carrier thus has a representative role which, though it does not include an express agency to accept service of process, is nonetheless relevant when process cannot otherwise be served upon the insured. Realistically, there is more of a chance that defendant will learn of the suit by such service than through available alternatives, for the carrier is likely to have an interest in finding him." *Feuchtbaum, supra* at 178.

Service must be consistent with due process requirements. The *Feuchtbaum* court indicated that due process is satisfied upon a weighing of the plaintiff's need, the public interest, the reasonableness of plaintiff's efforts under all the circumstances to inform the defendant and the availability of other safeguards for the defendant's interests. *Id.* at 177.

Third-party plaintiff's need is quite apparent. The plaintiff alleges that he was injured by a device distributed by Alpha. It is further alleged that the device was manufactured by Schermer. The public interest is furthered by having all parties allegedly responsible for the plaintiff's injuries involved in one suit so that remedies can be pursued and injuries can be compensated for. Schermer clearly has notice of the claims against it and fully appreciates those claims.

Due process also requires that the party seeking substituted service on an insurance carrier make a *prima facie* showing that the claims asserted against the defendant are covered by insurance. *Houie, supra* at 522. Schermer does not dispute the fact that it is insured. Rather, it claims that it is not insured by the Allianz Insurance Company located in Los Angeles, California. It further asserts that the Allianz Insurance Company located in Los Angeles is not authorized to accept service for it.

As to the issue of whether Allianz Insurance Conpany (Allianz) insures Schermer, Judge Feller correctly noted that there is a sharp discrepancy between the proofs presented bv Alpha and the certification submitted by Schermer. The proofs submitted by Alpha consist of letters written by representatives of Allianz relative to two prior lawsuits involving stunning devices. The letters are on Allianz stationery. The captions of the letters state: "Our insured Karl Schermer". These letters clearly establish that Allianz was acting as insurer for Schermer concerning: adjusting the loss, negotiating settlements, investigating the loss, corresponding with

counsel and corresponding with other carriers. It was argued, and ultimately found by Judge Feller, that the proofs submitted by Alpha made a *prima facie* showing that the claims asserted against Schermer were covered by Allianz.

Schermer argues that Allianz was not the carrier for Schermer and was not authorized to accept service for Schermer. Even if we assume for the sake of this appeal that Allianz was no more than an adjusting firm acting on behalf of Allianz Versicherungs-AG, service was still proper under *Young v. Bunny Bazaar, Inc.*, 107 N.J. Super. 320 (Law Div. 1969). The lawsuit in *Young* arose out of an automobile accident. The defendant could not be served. The summons and complaint was thereafter served on the insurance adjusting firm for the defendant's carrier. A motion was made to dismiss the complaint, and the motion was denied. The Court found that substituted service upon insurance carriers was proper. It also found that the fact that the plaintiff dealt with the insurance adjuster rather than the carrier was not significant. *Id.* at 327.

Schermer argues that *Young* was improperly decided. Yet the case has never been reversed and is often cited in decisions pertaining to the issue of substituted service. *See, Houie v. Allen, supra; Austin v. Millard,* 164 N.J. Super. 219, 224 (App. Div. 1978); *Muntz v. Smaily,* 118 N.J. Super. 80, 83 (App. Div. 1972); *Feuchtbaum v. Constantini, supra.*

In analyzing a case such as this one, a balance must be struck between the interests of the third-party plaintiff and the rights of the third-party defendant. The importance to Alpha of having Schermer involved in this case is self-evident. The rights of Schermer have been preserved. It has been given notice and an opportunity to appear and fully defend itself. It is well aware of the allegations against it and will suffer no prejudice as a result of Judge Feller's decision. That decision is well supported by case law and should not be reversed.

CONCLUSION

For the reasons set forth hereinabove, the respondent respectfully requests the Court to deny petitioner's writ.

Respectfully submitted,

ROBERT F. COLQUHOUN
COLQUHOUN & COLQUHOUN, P.A.
Attorneys for Respondent

APPENDIX A—CERTIFICATION IN LIEU OF AFFIDAVIT

Robert F. Colquhoun, Esq. certifies that:

1. I am an attorney-at-law of the State of New Jersey, a member of the law firm of Colquhoun & Colquhoun, P.A., attorneys for the third-party plaintiff-respondent and am familiar with all the facts herein.

2. During the pendency of the appellate applications in this matter this office has undertaken to forward the necessary documents to the Ministerium fur Justiz in West Germany for service upon Karl Schermer & Co. pursuant to the provisions of the Hague Service Convention. The summons, complaint and third-party complaint were forwarded in both English and German.

3. I have received a certified mail return receipt from West Germany indicating that the papers have been received by the Ministerium fur Justiz on or about August 6, 1987.

4. I expect that the summons, complaint and third-party complaint will be served upon Karl Schermer & Co. prior to a determination on its petition for certiorari which event will render the petition moot.

5. I will forward to the Court a copy of the return of service from West Germany upon receipt.

6. I certify that the foregoing statements made by me are true to the best of my information, knowledge and belief and know that should any of said statements be false, I am subject to punishment.

s/ Robert F. Colquhoun
Robert F. Colquhoun

APPENDIX B—LETTER DATED JULY 31, 1987 TO MINISTERIUM FUR JUSTIZ, WEST GERMANY WITH RETURN RECEIPTS ATTACHED

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July 31, 1987

Ministerium fur Justiz
Baden-Wurttemberg
Postfach 5 37
7000 Stuttgart 1
West Germany

Gentlemen:

re: Macri v. Alfa International v. Karl Schermer & Co.
Your Ref. 9341 E - 345/86
Our File #A15,801

Pursuant to your request dated July 22, 1987, we enclose herewith the documents previously forwarded to you together with two copies of the documents in the original English. We would appreciate it if you would kindly serve these pleadings on Karl Schermer & Co. and return the completed Certification to us.

Appendix B

Thank you for your courtesy and assistance.

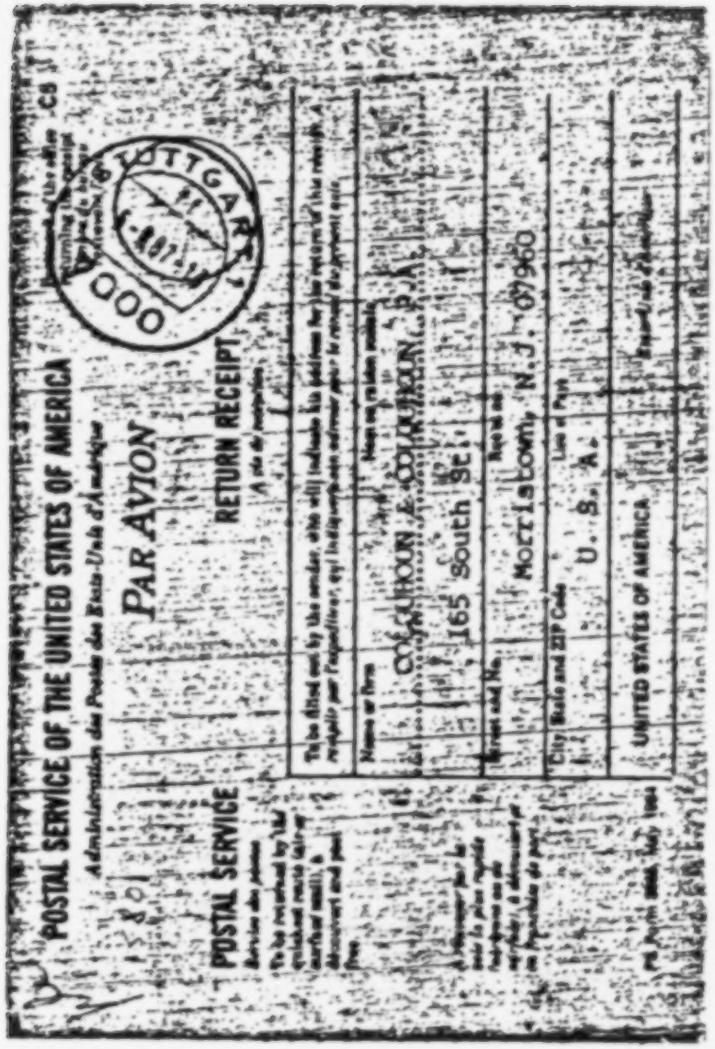
Very truly yours,

COLQUHOUN & COLQUHOUN, P.A.

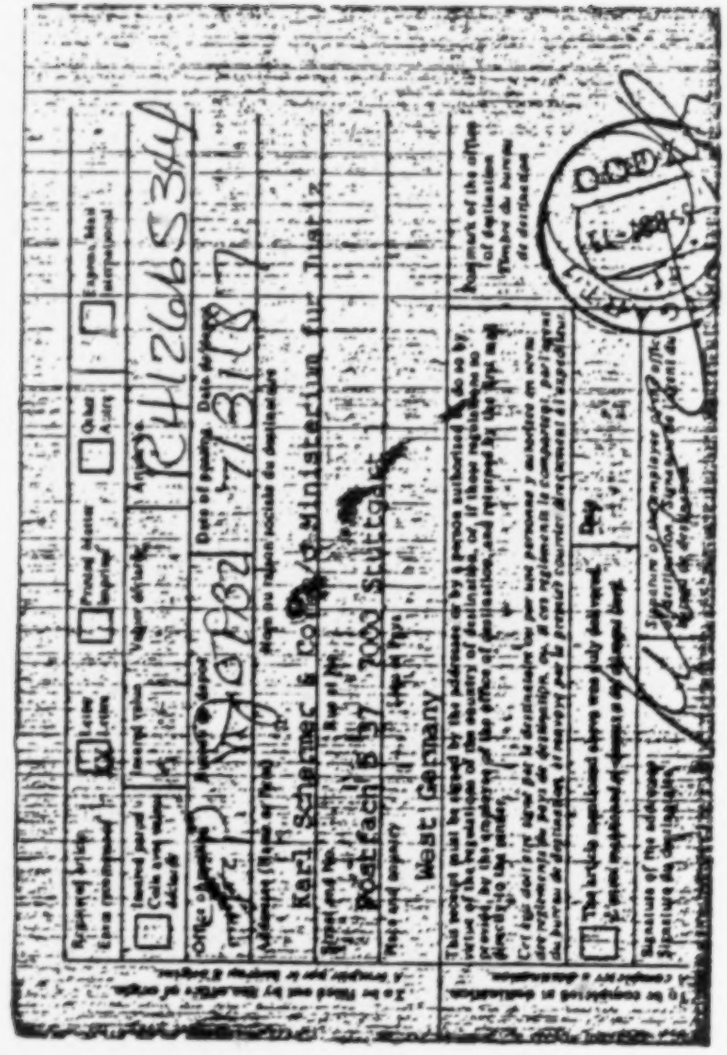
By: s/ Robert F. Colquhoun
Robert F. Colquhoun

RFC:mb

Appendix B



Appendix B



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